Oklahoma Installation Company and United Brotherhood of Carpenters & Joiners Local Union No. 943. Case 17–CA–18500

May 14, 1998

DECISION AND ORDER

By Chairman Gould and Members Fox and Hurtgen

Resolution of the unfair labor practice allegations in this case¹ turns on whether the judge correctly found that the Union did not have the status of an exclusive bargaining representative within the meaning of Section 9(a) of the Act. The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent and the Union had entered into a collective-bargaining relationship and executed a contract pursuant to Section 8(f) of the Act, which provides an industry exception to the majoritarian principles of representation in Section 9(a). He therefore concluded that the Respondent had no legal obligation to continue this relationship or to adhere to the terms of the contract once it had expired. He recommended dismissal of the complaint alleging that postcontract withdrawal of recognition and unilateral changes by the Respondent violated Section 8(a)(5) and (1). We find, contrary to the judge, that the Respondent recognized the Union as the full 9(a) representative of bargaining unit employees. The Respondent therefore had a continuing obligation to recognize and bargain with the Union, and to adhere to the terms of the parties' expired contract. We shall therefore reverse the judge and find the violations alleged in the complaint.

The Respondent is a construction industry employer engaged in the business of commercial remodeling and installing retail store fixtures. In February 1993, it signed a "Recognition Agreement and Letter of Assent" binding it to a 1993–1995 collective-bargaining agreement between the Union and Oklahoma Fixture Company (OFC) covering present and future jobsites within the Union's geographic jurisdiction.² The first paragraph of the recognition agreement and letter of assent (letter of assent) states that the Union has submitted, and the Employer is satisfied that the Union

represents a majority of its employees in a unit that is appropriate for collective bargaining.

In August 1995, 2 months after expiration of the contract, the Respondent commenced work on a project within the geographic jurisdiction of the Union. In disregard of the provisions of the expired contract, the Respondent performed the work with workers who were not referred from the Union's hiring hall, paid them wages below the rates specified in the contract, and ceased payments to the Union's fringe benefit funds.

In dismissing the complaint, the judge rejected the contention of the General Counsel that the Union attained the status of a 9(a) representative in 1993 when the Respondent signed the letter of assent. Although he found that the language of the letter of assent "certainly suggest[ed] that a Section 9(a) relationship existed between the Respondent and the Union," the judge concluded to the contrary in the absence of additional supporting evidence that the Union had demonstrated its majority support to the Respondent. We disagree.

As the judge recognized, this case involves interpretation and application of the general principles set forth in *John Deklewa & Sons*, 282 NLRB 1375 (1987). In *Deklewa*, the Board declared a presumption that bargaining relationships in the construction industry are governed by Section 8(f). The Board further affirmed, however, that a union seeking to represent employees in the construction industry could achieve 9(a) representative status. In several decisions subsequent to *Deklewa*, the Board has explained that a union may prove the existence of a 9(a) relationship by submitting positive evidence that it unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such.³

We find that the language of the letter of assent is sufficient proof of the Union's unequivocal demand for recognition as a 9(a) bargaining representative and the Respondent's voluntary acceptance of the demand. As quoted above, the Respondent acknowledged in the letter that it was "satisfied that the Union represents a majority of its employees" in the appropriate unit. Because the Act confers 9(a) status only on majority unions, and because Section 8(f) permitted these parties to contract without concern for the Union's majority status, it is clear that the Respondent's recognition of the Union as the majority representative of unit employees constituted recognition on the basis of Section 9(a).

Contrary to the judge, we find no warrant to deny the legal effect of the express terms of the letter of assent because of the Union's failure to submit additional

¹ On January 15, 1997, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answer brief.

²The Board certified the Union as the Sec. 9(a) representative of OFC employees in March 1992. The Union thereafter filed unfair labor practice charges alleging that OFC and the Respondent were alter egos and/or a single employer. Cases initiated by those charges settled after the Respondent executed the recognition agreement and letter of assent.

³ Golden West Electric, 307 NLRB 1494, 1495 (1992); Triple A Fire Protection, 312 NLRB 1088 (1993); and Goodless Electric Co., 321 NLRB 64, 66 (1996), enf. denied 124 F.3d 322 (1st Cir. 1997).

evidence of its majority status, such as authorization cards, an employee poll, or a majority-supported petition requesting an election. Although evidence of this kind has been a relevant factor in many of the post-Deklewa cases in which 9(a) status has been found,⁴ the Board has never held that contract language alone of the kind at issue here is insufficient to achieve such standing. Indeed, to require more would contravene Deklewa's admonition that unions in the construction industry should not be treated less favorably than those outside the construction industry. 282 NLRB at 1387 fn. 53. Outside the construction industry,

[A] union . . . is not required to show the employer any evidence of majority status unless the employer requests to see the evidence. Moisi & Son Trucking, 197 NLRB 198 (1972); Soil Engineering Co., 269 NLRB 55 (1984); Marysville Travelodge, 233 NLRB 527 (1977); and Lincoln Mfg. Co., 160 NLRB 1866, 1876-1877 (1966). If an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e., beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union. Morse Shoe, Inc., 231 NLRB 13 (1977); Berbiglia, Inc., 233 NLRB 1476 (1977). Moreover, where an employer outside the construction industry expressly recognizes a union as the 9(a) representative, the union becomes the 9(a) representative of the unit employees, unless the employer timely produces affirmative evidence of the union's lack of majority at the time of recognition, i.e., within the 10(b) period. See Royal Coach Lines, 282 NLRB 1037 (1987); E. L. Rice & Co., 213 NLRB 746 (1974); Moisi & Son Trucking, supra The Board's ruling in [Casale Industries, 311 NLRB 951 (1993)] effectively extends time limitations similar to 10(b) limitations to the construction industry.5

We also find no merit in the Respondent's argument that the absence of specific mention of Section 9(a) in the letter of assent precludes finding that recognition was sought and extended on this statutory ground. Where, as here, an employer expressly recognizes a union in writing as the *majority* representative of unit employees, i.e., the very essence of 9(a) status, it is

unnecessary that specific reference be made to Section 9(a) itself.

Having found, therefore, that a 9(a) relationship existed between the parties on and after February 1993, the Respondent was obligated to continue recognition of the Union and to adhere to the terms of the expired collective-bargaining agreement. Its failure to do so violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.
- 2. Since February 26, 1993, the Union, pursuant to Section 9(a) of the Act, has been the exclusive representative of the Respondent's employees who perform carpentry and construction work within the jurisdiction of the Union.
- 3. By withdrawing recognition from the Union and refusing to bargain with the Union after May 31, 1995, and by unilaterally discontinuing and changing employees' existing terms and conditions of employment, the Respondent has violated Section 8(a)(5) and (1) of the Act.
- 4. The violations found are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action to effectuate the policies of the Act. Specifically, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive bargaining agent of its carpentry and construction employees working within the Union's jurisdiction. We shall also order the Respondent, on request by the Union, to rescind changes in employment terms made after May 31, 1995, restoring those employment terms to levels that existed prior to that date. As to those employment terms for which rescission is requested and restoration occurs, the Respondent shall be ordered (1) to make whole all unit employees for any loss of wages and other benefits suffered, as calculated in accordance with Ogle Protection Service, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987); (2) to make whole any fringe benefit funds in the manner prescribed in Merryweather Optical Co., 240 NLRB 1213 (1979); (3) to reimburse employees for any losses or expenses they may have incurred because of its failure to make payments to those funds, in the manner prescribed in Kraft Plumbing & Heating, 252 NLRB 891

⁴See, e.g., *Goodless Electric*, supra at 66–67 (authorization cards); *Golden West Electric*, supra at 1495 (same); *Triple A Fire Protection*, supra at 1088 (fringe benefit report "confirming that all, or nearly all . . . employees are members of and represented by [union]").

⁵ Hayman Electric, 314 NLRB 879, 887 fn. 8 (1994); accord: Decorative Floors, Inc., 315 NLRB 188, 189 (1994).

fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest computed in the manner prescribed in New Horizons for the Retarded; and (4) to offer immediate and full employment to those applicants who would have been referred to the Respondent for employment through the Union's hiring hall were it not for the Respondent's unlawful conduct, and to make them whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's failure to hire them, as provided in J. E. Brown Electric, 315 NLRB 620 (1994). Backpay is to be computed in a manner consistent with F. W. Woolworth Co., 90 NLRB 289 (1950), with interest thereon as set forth in New Horizons for the Retarded, supra. Reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage. J. E. Brown, supra at 623.

ORDER

The Respondent, Oklahoma Installation Company, Owasso, Oklahoma, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Withholding recognition from, and failing and refusing to bargain with United Brotherhood of Carpenters & Joiners Local Union No. 943 as the exclusive representative of employees in an appropriate unit consisting of:
 - All carpentry and construction employees who perform work within the jurisdiction of the Union.
- (b) Changing terms and conditions of employment for unit employees without first giving notice to the Union and affording it an opportunity to bargain about the proposed change.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Recognize and, on request, bargain in good faith with the Union as the exclusive bargaining agent for unit employees and embody any agreement reached in a written contract.
- (b) On request of the Union, rescind any or all changes made on and after May 31, 1995, in the terms and conditions of employment for unit employees, and make whole all unit employees and benefit funds for losses suffered as result of these changes in the manner prescribed in the remedy section of this decision.
- (c) Offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of the Respondent's failure to hire them, in the manner set forth in the remedy section of this decision.

- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its Owasso, Oklahoma facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 1996.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I do not find that the Union was the 9(a) representative of the Respondent's employees. Accordingly, I would dismiss the complaint alleging that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union following expiration of the parties' collective-bargaining agreement.

In *Deklewa*¹ and its progeny, the Board established the principle that the bargaining relationship between a construction industry employer and union is presumed to be Section 8(f) rather than Section 9(a). See, e.g., *Comtel Systems Technology*, 305 NLRB 287, 289 (1991). The party asserting that the relationship is governed by Section 9(a) has the burden of proof. *Casale Industries*, 311 NLRB 951, 952 (1993). Under *Deklewa*, this burden is met either where there has been a Board-conducted representation election or where the union has made an express demand for, and

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert. denied 488 U.S. 889 (1988).

the construction employer has voluntarily granted, recognition of the union as the 9(a) bargaining representative based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit. *Brannan Sand & Gravel*, 289 NLRB 977, 979–980 (1987); and *J & R Tile*, 291 NLRB 1034, 1036 (1988).²

In the instant case, there was no contemporaneous showing of majority support. In addition, the language of the contract does not clearly state that there was such a showing.3 Nor does it clearly state that the Respondent extended Section 9 recognition. The contract language says that "the Union represents a majority of [the] employees." However, "representation" is not the issue: a union "represents" employees in both 9(a) and 8(f) situations. Similarly, the contract says that the Union is the "exclusive" representative. However, exclusivity in representation is as true of 8(f) relationships as it is of 9(a) relationships. In sum, there is no language which simply declares that the employees have signed cards or otherwise designated the Union as their representative, and that the Respondent has extended Section 9 recognition.

In light of the lack of clarity, I consider it appropriate to look to what actually happened at the time when the parties entered into the contract. At that time, according to the evidence, there were no employees, and thus necessarily there was no showing of majority support. In short, this was a *pre-hire contract*, pure and simple. Accordingly, I conclude that the contract was classically an 8(f) contract. It follows that Respondent was free to withdraw recognition at the end of that contract.

My colleagues assert that unions in the construction industry should not be treated less favorably than those outside the construction industry. However, as my colleagues acknowledge, Section 9 status in a nonconstruction industry is defeated if the employer shows that there was no majority status at the time of recognition. As discussed above, there is such a showing here.

I recognize that, outside the construction industry, the showing of lack of majority must be made within 6 months of recognition. That is, where *Section 9* recognition is extended, persons with knowledge thereof have 6 months in which to attack it. However, in the

construction industry, recognition can be under Section 9 or 8(f). Where, as in the instant case, it is not clear that Section 9 recognition was extended, the presumption in favor of 8(f) status is not rebutted. In any event, persons were not on clear notice that a Section 9 relationship was intended. Thus, the 6-month bar on attacking Section 9 relationships does not apply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withhold recognition from and fail and refuse to bargain with United Brotherhood of Carpenters & Joiners Local Union No. 943 as the exclusive representative of our employees in the following appropriate bargaining unit:

All carpentry and construction work employees who perform work within the jurisdiction of the Union.

WE WILL NOT change any term and condition of employment for unit employees without first giving the Union notice and affording it an opportunity to bargain about that change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for unit employees on and after May 31, 1995.

WE WILL, on request, rescind any or all unilateral changes made on or after May 31, 1995, in terms and conditions of employment of unit employees and WE WILL make those employees and their benefit funds whole for any losses resulting from those unilateral changes.

WE WILL offer immediate and full employment to those applicants who would have been referred for employment by the Union were it not for our unlawful

²I recognize that there are some cases which appear to have backtracked from the requirement of a contemporaneous showing of majority support. *Decorative Floors*, 315 NLRB 188 (1994); *MFP Fire Protection*, 318 NLRB 840 (1995), enfd. 154 LRRM 2034 (8th Cir. 1996); and *American Automatic Sprinkler Systems*, 323 NLRB No. 160 (June 11, 1997). However, *Brannan Sand* and *J & R Tile* have never been overruled, and I agree with that precedent.

³ The clause, as set forth in the "Recognition Agreement and Letters of Assent," states, in relevant part that the:

Union has submitted, and the Employer is satisfied that the union represents a majority of its employees in a unit that is appropriate for collective bargaining.

conduct, and make them whole for any loss of earnings and other benefits suffered by reason of our failure to hire them.

OKLAHOMA INSTALLATION COMPANY

Francis A. Molenda, Esq., for the General Counsel.

Stephen L. Andrew, Esq., of Tulsa, Oklahoma, for the Respondent.

Thomas F. Birmingham, Esq., of Tulsa, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On March 13 and July 23, 1996, a charge and amended charge were filed by Carpenters Local 943 (the Union) against Oklahoma Installation Company (Respondent).

On July 24, 1996, the National Labor Relations Board, by the Acting Regional Director for Region 17, issued a complaint which alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) since about September 13, 1995, when it withdrew recognition from the Union and failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and when it failed to maintain the established terms and conditions of employment of the unit, as evidenced by the expired collective-bargaining agreement between Oklahoma Fixture Company and the Union, by failing to use the Union's hiring hall, to pay into fringe benefit funds, and to pay the contractual wage rates.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me on October 8, 1996, in Tulsa, Oklahoma.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the one witness called to testify, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, with an office and place of business in Owasso, Oklahoma, has been engaged in the building and construction industry as an installer of store fixtures.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this case are undisputed. The evidence consists of 2 General Counsel exhibits, plus the formal papers, 27 Respondent exhibits, and the testimony of one witness,

i.e., Union Business Manager J. C. Phillips, whose credibility is not disputed.

The Respondent is engaged in the installation of retail store fixtures and related products and is an employer in the construction industry. Oklahoma Fixture Company is engaged in the manufacture and installation of retail store fixtures. The Union was certified as the 9(a) representative of a unit of Oklahoma Fixture Company's employees on March 9, 1992, following a Board-conducted election wherein Oklahoma Fixture Company's employees voted to be represented by the Union. Thereafter, the Union filed charges in Cases 17–CA–16321 and 17–CA–16380 alleging that these two companies, i.e., Respondent and Oklahoma Fixture Company, were alter egos and/or a single employer. The cases were set for trial in 1993, but were settled when the Respondent agreed to execute a recognition agreement and letter of assent on February 26, 1993.

When the parties executed the recognition agreement and letter of assent there were no employees of the Respondent working within the jurisdiction of the Union, although the Respondent employed carpenters both before and after the execution of the recognition agreement. Under the recognition agreement, which is in evidence as Respondent Exhibit 21, the Union and the Respondent bound themselves to the collective-bargaining agreement between Oklahoma Fixture Company and the Union which was to expire by its terms on May 31, 1995, and contained a provision for a 90-day notice of termination. Oklahoma Fixture Company gave timely notice pursuant to that provision on January 13, 1995. Oklahoma Fixture Company and the Union have bargained for a new contract but have not reached an agreement.

The Respondent was working in the Union's jurisdiction between August 1995 and July 1996, which was subsequent to the expiration date of the contract Respondent agreed to be bound by. Respondent was working and employing carpenters at the Tulsa Promenade Mall Dillards Department Store doing remodeling. The Respondent had not made requests for carpenters under the Union's referral system, nor had it made payments into the benefits funds. In addition, the Respondent had paid most of its employees a rate well below the contract rate of \$13.50 per hour.

The primary issue in this case is whether the relationship between Respondent and the Union is a 9(a) or an 8(f) relationship. The General Counsel and the Union maintain that the parties had a 9(a) relationship whereas the Respondent maintains that the relationship was an 8(f) relationship. If the relationship was an 8(f) relationship, then when the contract expired Respondent's obligation to bargain with the Union terminated. If we have a 9(a) relationship, Respondent continued to have the duty to bargain with the Union.

Section 9(a) states as follows:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without

the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 8(f) states as follows:

It shall not be an unfair labor practice under subsections (a) and (b) of this section, for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Paragraph 1 of the recognition agreement and letter of assent signed by Respondent and the Union contains the following language: "The Union has submitted, and the Employer is satisfied that the Union represents a majority of its employees in a unit that is appropriate for collective bargaining." This language would certainly suggest that a 9(a) relationship existed between Respondent and the Union. However, the evidence reflects that there was no election among Respondent's employees in which they selected the Union as their collective-bargaining representative, there was no showing of authorization cards by the Union to establish majority status, there was no petition presented by the Union signed by a majority of Respondent's employees reflecting their desire to be represented by the Union, and there was no other showing at or about the time of the execution of the recognition agreement and letter of assent that the Union represented a majority of Respondent's employees.

In *Deklewa*, the Board held that a party asserting the existence of a 9(a) relationship has the burden of proving it. *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1975), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Similarly, in *Casale*

Industries, 311 NLRB 951, 952 (1993), the Board stated that it is presumed that parties in the construction industry intend their relationship to be an 8(f) relationship, and the burden of proof is on the party who seeks to prove the 9(a) relationship. It is undisputed that Respondent and the Union are in the construction industry.

In *Deklewa*, the Board discussed the requirements for a 9(a) relationship in the construction industry. *Deklewa* at 1385. The Board stated that in the event of a Board election, a vote in favor of a union would result in that union's certification and the full panoply of 9(a) rights and obligations. The Board also indicated that in the construction industry, as elsewhere, an employer may enter into a 9(a) collective-bargaining relationship by voluntarily recognizing the union based on a clear showing of majority support among the employees. Id. at 1387 fn. 53. In the instant case there was no election among Respondent's employees won by the Union and no showing, clear or otherwise, of majority support among the employees.

What I find happened in this case is that to settle an outstanding unfair labor practice case the Respondent agreed to be bound by the terms and conditions of the agreement entered into between the Union and Oklahoma Fixture Company.

Paragraph 2 of the recognition agreement and letter of assent provides as follows:

The Employer recognizes the Union as the exclusive collective bargaining agent for its employees who perform carpentry and construction work within the jurisdiction of the Union on all present and future job sites. The Employer, from the date of this letter of assent, agrees to be bound by the terms and conditions, including any extensions, renewals or modifications of a certain collective bargaining agreement between Oklahoma Fixture Company and Carpenters Local Union 943 covering outside construction work dated the 26th day of February, 1993, including the obligation to make the contractually-stated contributions to and be bound by the terms and conditions of the Declaration of Trust of the Oklahoma Carpenters Health and Welfare Fund, the Carpenters Labor-Management Pension Fund, and the Carpenters Joint Training and Apprenticeship Fund.

The Employer and the Union agree that this Agreement shall be enforceable in a court of law, and in equity.

This letter of assent, to be bound by the Collective Bargaining Agreement between the Oklahoma Fixture Company and Carpenters Local Union 943, covering outside construction work, shall remain in effect until terminated by the undersigned employer by giving written notice to the Union at 8220 East Skelly Drive, Tulsa, Oklahoma, 74129, at least 150 days prior to the then-current anniversary date of the collective bargaining agreement between Oklahoma Fixture Company and Carpenters Local Union 943 covering outside construction work.

As there was no election won by the Union among Respondent's employees and no showing of majority support for the Union among Respondent's employees, the relationship between the Respondent and the Union was an 8(f) rela-

tionship. See *Goodless Electric Co.*, 321 NLRB 64 (1996); *Golden-West Electric*, 307 NLRB 1454, 1495 (1992); and *J* & *R Tile*, 291 NLRB 1034, 1036 (1988).

On May 31, 1995, the underlying agreement between the Union and Oklahoma Fixture Company expired. A new agreement has not been reached between those parties. On the expiration of that contract the Union no longer enjoyed a presumption of majority status and Respondent was free to repudiate the 8(f) relationship. Section 10(b) does not limit the Respondent's right to do what it did when it did it, i.e., to refuse to apply a contract that had expired and to refuse to bargain with the Union when it was asked to do so after the contract, to which it agreed to be bound, terminated.

Article XVI of the agreement between the Union and Oklahoma Fixture Company, which agreement Respondent agreed to be bound by, provided for termination of the agreement in the event either party gives to the other written notice of termination 90 days prior to the anniversary date of the agreement. It is undisputed that such notices were given by both Oklahoma Fixture Company and the Union, and that as a result, the contract was terminated.

The 8(f) agreement between Respondent and the Union provided that the parties would be bound by the February 23, 1993 contract between Oklahoma Fixture Company and the Union, "including any extensions, renewals or modifications" of that agreement. That agreement has expired. Accordingly there is no contract in existence between Respondent and the Union. The 150 days' notice to terminate language in the recognition and letter of assent was operative if the Union and Oklahoma Fixture Company agreed to an

extension or modification of the February 23, 1993 agreement and Respondent wanted to terminate its relationship with the Union. Because the contract between Oklahoma Fixture Company and the Union expired and was not extended, renewed, or modified, Respondent was permitted to walk away from its 8(f) relationship with the Union. It no longer had a duty to bargain with the Union.

Because the relationship between Respondent and the Union was an 8(f), rather than a 9(a), relationship, and since the contract, which Respondent agreed to be bound by, expired the Respondent was free to withdraw recognition from the Union and was free to no longer apply the terms of the contract and was free to unilaterally decide to refrain from using the Union's referral system, pay union wages to its employees, or make payments into union benefit funds. The Union, of course, is free to organize Respondent's employees as it did the employees of the Oklahoma Fixture Company.

CONCLUSIONS OF LAW

- 1. Oklahoma Installation Company, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. United Brotherhood of Carpenters and Joiners Local Union No. 943 is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent did not violate the Act as alleged in the complaint.

[Recommended Order for dismissal is omitted from publication.]